

Issue: Group I Written Notice (failure to follow policy); Hearing Date: 01/06/15;
Decision Issued: 01/07/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10497; Outcome: No Relief – Agency Upheld; **Administrative Review: DHRM
Ruling Request received 01/20/15; DHRM Ruling issued 02/05/15; Outcome:
AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10497

Hearing Date: January 6, 2015

Decision Issued: January 7, 2015

PROCEDURAL HISTORY

On July 30, 2014, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow policy.

On August 6, 2014, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On November 17, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 6, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employs Grievant as a Power Plant Operator at one of its facilities. One of his duties includes supervising inmates working in the boiler room. No evidence of prior active disciplinary action was introduced during the hearing.

On July 15, 2014, Grievant was working in the power plant. He was responsible for supervising one inmate. At 9:15 p.m., Grievant checked on the Inmate to determine his location. At 9:50 p.m., Grievant went into the boiler plant to check on the Inmate. He did not see the Inmate in the boiler room, so he began searching other rooms in the plant. At 10:05 p.m., Grievant called staff at the Work Center to inform them that he could not locate the Inmate. At 10:13 p.m., two corrections officer arrived at the power plant and assisted with the search. One of the corrections officers walked out the side door of the power plant and observed the Inmate returning with a food tray. The Inmate claimed he had been feeding some puppies on the side of the bank of the road near the power plant.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."¹ Group II offenses "include acts and behavior that are more severe in

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

nature and are such that an accumulation of two Group II offenses normally should warrant removal.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

DOC Operating Procedure 425.1 governs Outside Work Assignments. Section IV provides that Class II inmates residing in a Level 1 facility must be supervised as follows:

Maintained under supervision with 30 minute checks from a corrections officer or a certified DOC foreman in radio contact with institution.

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁴ Grievant performed a security check of the Inmate at 9:15 p.m. and completed a second check 35 minutes later at 9:50 p.m. The Agency’s evidence showed that Grievant could complete a security check sooner than 30 minutes but not after 30 minutes to remain in compliance with policy. By completing a security check beyond the 30 minute requirement, Grievant failed to comply with DOC Operating Procedure 425.1. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. The Agency mitigated the disciplinary action to a Group I Written Notice which must be upheld.

Grievant argued that the Inmate was a Class I offender in a Level I facility and, thus, Grievant was obligated to supervise the Inmate using merely “frequent and consistent checks of the offender to ensure his presence.” This argument fails based on the evidence presented. Grievant did not testify or otherwise establish that the Inmate was a Class I offender. The Agency presented evidence showing the Inmate was a Class II offender and, thus, the 30 minute check requirement applied.

Grievant argued that he was not trained regarding the 30 minute check requirement. The Agency showed that Grievant received training regarding inmate supervision. Grievant did not testify and did not otherwise present evidence supporting his assertion that the Agency’s training did not include a discussion about the 30 minute time requirement. The Hearing Officer cannot conclude that Grievant received inadequate training regarding his obligation to conduct 30 minute supervisory checks.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource

² Virginia Department of Corrections Operating Procedure 135.1(V)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

Management”⁵ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor

⁵ Va. Code § 2.2-3005.

Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁶

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.